A

LEE EWE POH

v.

DR LIM TEIK MAN & ANOR

B

HIGH COURT MALAYA, PULAU PINANG
CHEW SOO HO JC
[CIVIL SUIT NO: 22-170-2007]
2 SEPTEMBER 2010

C ***CIVIL LAW ACT:*** *English law - Applicability of English common law in Malaysia - Invasion of privacy rights - Whether an actionable tort in Malaysia - Whether recognised under English common law - Civil Law Act 1956, s. 3*

D ***CIVIL PROCEDURE:*** *Damages - Invasion of privacy - Whether an actionable wrong - Photographs of private part of female patient taken by surgeon during surgery to facilitate explanation of procedure to patient - Whether violation or invasion of privacy - Whether plaintiff entitled to aggravated or exemplary damages*

E ***TORT:*** *Breach of confidence - Cause of action - Photographs of private part of female patient taken by surgeon during surgery to facilitate explanation of procedure to patient - Whether violation or invasion of privacy - Whether an actionable wrong - Whether acceptable medical practice for photographs to be taken in course of surgical procedure -*
F *Whether plaintiff entitled to aggravated or exemplary damages*

TORT: *Invasion of privacy - Whether an actionable tort - Principles applicable - Photographs of private part of female patient taken by surgeon during surgery to facilitate explanation of procedure to patient -*
G *Whether violation or invasion of privacy - Whether acceptable medical practice for photographs to be taken in course of surgical procedure - Whether plaintiff entitled to aggravated or exemplary damages*

TORT: *Vicarious liability - Principal's liability for agent's wrongful act - Invasion of privacy - Claim for damages - Principles applicable*
H

The plaintiff, a freelance writer, was suffering from haemorrhoids or piles and had on 20 December 2006 consulted the 1st defendant who was a General and Colorectal Surgeon practising in Loh Guan Lye Specialist Centre ('the Specialist Centre') owned
I and operated by the 2nd defendant. The plaintiff was admitted to the Specialist Centre and a procedure known as Stapler Haemorrhoidectomy was performed by the 1st defendant with the

result that the plaintiff's haemorrhoids was successfully removed. She was discharged on 22 December 2006. On 27 December 2006, when the plaintiff called the Specialist Centre to inquire about what had exactly happened during the procedure, she was shocked to learn from the nurse that the 1st defendant had taken photographs of her private part (anus) during the procedure. The plaintiff claimed a violation of privacy and/or dignity by the 1st defendant since she was never asked and she did not give her consent for the 1st defendant to photograph her private part when she was under anaesthesia. The 1st defendant claimed that, in accordance with accepted medical practice, one photograph was taken before the procedure and one after the procedure. This was to facilitate easy explanation to the patient after the aforesaid procedure. The following issues arose for determination: (i) Whether plaintiff's cause of action for violation or invasion of privacy rights was actionable under the law of tort. The 1st defendant contended that invasion of privacy rights is not a recognized breach in tort under the English common law and hence it is also not an actionable tort in Malaysia pursuant to s. 3 of the Civil Law Act 1956; (ii) Whether it is an acceptable medical practice for photographs to be taken in the course of surgical procedure and whether the 1st defendant was entitled to take the two photographs showing the anus of the plaintiff without her prior knowledge and consent; and (iii) Whether the plaintiff was entitled to aggravated and/or exemplary damages in the event her claim was allowed.

Held:

(1) The privacy right of a female in relation to her modesty, decency and dignity in the context of the high moral value existing in our society is her fundamental right in sustaining that high morality that is demanded of her and it ought to be entrenched. Hence, it is just right that our law should be sensitive to such rights. In the circumstances, the plaintiff in the instant case ought to be allowed to maintain such claim. (para 8)

(2) In relation to the cause of action for breach of confidence, the photographs were information having the necessary quality of confidence as they involved the modesty, decency and dignity of a woman. Secondly, the 1st defendant was under an obligation to maintain confidence of that information on the

general duty of the doctor arising from the doctor-patient relationship. Thirdly, there was unauthorized use or disclosure of that information since the Hospital's nurse knew of the confidential information *ie*, the photographs. Thus, the plaintiff came within the cause of action of breach of trust or confidence for having satisfied the three requirements for liability under this cause of action. (para 9)

(3) In order for the surgeon to take photographs of a female patient's intimate parts of her anatomy, the proper procedure to adopt is to obtain her prior consent whether it is written or oral. Consent is not to be construed as an illusion or a formality but an absolute requirement when it involves images of the intimate parts of a female patient. (para 13)

(4) The plaintiff's fear that her images showing her anus and/or private part taken without her knowledge and without her consent could have reached the public domain was not unfounded but tangible. (para 13)

(5) The 1st defendant's failure to obtain prior consent from the plaintiff before taking the photographs constituted an invasion of the plaintiff's privacy or a breach of the trust and confidence that the plaintiff as patient had reposed on the 1st defendant as her treating doctor. In the circumstances, the plaintiff had proved her case against the 1st defendant. The 2nd defendant was vicariously liable to the plaintiff's claim. (para 15)

(6) Aggravated damages is awarded to show the disapproval of the acts of a defendant which were carried out in such a manner that the plaintiff has suffered more than would normally be expected in such a case. To qualify for aggravated damages, the acts must be calculated to injure the feelings of the plaintiff. There was no sufficient evidence to justify aggravated damages to be awarded. (para 18)

(7) Exemplary damages serve the purpose of offering a serious punishment to the defendant and to deter others from behaving in the same way. The fundamental basis of exemplary damages must first be satisfied by the plaintiff *ie*, the plaintiff has to prove the culpability of the 1st defendant's conduct which must be so outrageous as to deserve punishment or deterrence. The 1st defendant's conduct could not be

construed as so outrageous as to warrant exemplary damages to punish and deter him. The plaintiff's case did not fall within the three categories for the award of exemplary damages as laid down by Lord Devlin in *Rookes v. Barnard*. (para 19)

(8) The plaintiff's claim was allowed and nominal damages was granted in the sum of RM25,000 with costs of RM10,000. The memory card containing the two offending photographs were ordered to be destroyed by the Deputy Registrar after the appeal period in the presence of the plaintiff and the defendants. (para 20)

Case(s) referred to:

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***

Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***

Lew Cher Phow @ Lew Cha Paw & Ors lwn. Pua Yong Yong & Satu Lagi [2009] 1 LNS 1256 HC ***(refd)***

Maslinda Ishak v. Mohd Tahir Osman & Ors [2009] 6 CLJ 653 CA ***(refd)***

Murray v. Yorkshire Fund Managers Ltd [1998] 1 WLR 951 ***(refd)***

Regina v. Department of Health Ex-parte Source Informatics Ltd [2001] QB 424 ***(refd)***

Rookes v. Barnard [1964] AC 1129 ***(refd)***

Rowlands v. Chief Constable of Merseyside [2006] 1 WLR 1065 ***(refd)***

Saltman Engineering Co Ltd v. Campbell Engineering Co Ltd [1948] 65 RPC 203 ***(refd)***

Tan Kau Tiah v. Tetuan Teh Kim Tek, Salina & Co & Anor [2010] 4 CLJ 914 CA ***(refd)***

Ultra Dimension Sdn Bhd v. Kook Wei Kuan [2004] 5 CLJ 285 HC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3

Other source(s) referred to:

Clerk & Lindsell on Torts, 18th edn, 2000 paras 1-34, 27-02, 27-03, pp 19, 1518

Michael A Jones, *Medical Negligence*, 2003, p 173, para 2-169

P Bhangoo, IK Maconochie, N Batrick, E Henry, *Emergency Medical Journal*, 2005, 22, pp 761-765

For the plaintiff - Simon Murali; M/s Lio & Partners

For the 1st defendant - Sagadevan Thangavelu (Nurul Huda Mansor with him); M/s Shearn Dealmore & Co

For the 2nd defendant - Ramsun Ho; M/s See Ramsun & Tan

Reported by Amutha Suppayah

JUDGMENT

Chew Soo Ho JC:

[1] Plaintiff, a freelance writer was suffering from haemorrhoids or piles and had on 20 December 2006 consulted the 1st defendant who is a General and Colorectal Surgeon practising in Loh Guan Lye Specialist Centre (hereinafter referred to as 'the Specialist Centre') owned and operated by the 2nd defendant. Plaintiff was admitted to the Specialist Centre and a procedure known as Stapler Haemorrhoidectomy was performed by the 1st defendant with the result that plaintiff's haemorrhoids was successfully removed. She was discharged on 22 December 2006. On 27 December 2006, when plaintiff called the Specialist Centre to inquire about what had exactly happened during the procedure, she was shock to learn from the nurse that the 1st defendant had taken photographs of her private part during the procedure. Plaintiff was outraged as photography was not in the agenda of the procedure and she was not duly informed. She claimed a violation of privacy and/or dignity by the 1st defendant since she was never asked for and she did not give her consent for the 1st defendant to photograph her privacy when she was under anaesthesia. She prayed for an injunction to restrain the defendants from publishing, disseminating etc of the said photographs taken by the 1st defendant, damages, interest and costs.

[2] 1st defendant admitted that he had taken two photographs of the anus of the plaintiff while she was under sedation ie, one photograph before the Stapler Haemorrhoidectomy and one after the said procedure. He contended that what he did was in accordance with accepted medical practice and he did not disseminate the two photographs but kept them as his medical records to facilitate easy explanation to the patient after the performance of the aforesaid procedure.

The Issues

[3] From the submissions of all parties in this case, the issues raised that called for determination can be deduced as follows:

(a) Whether plaintiff's cause of action for violation or invasion of privacy rights is actionable under the law of tort;

(b) Whether it is an acceptable medical practice for photographs to be taken in the course of surgical procedure and whether the 1st defendant is entitled to take the two photographs showing the anus of the plaintiff without her prior knowledge and consent; and

(c) Whether plaintiff is entitled to aggravated and/or exemplary damages in the event her claim is allowed.

Evaluation & Findings

1st Issue: Whether Plaintiff's Cause Of Action For Violation Or Invasion Of Her Privacy Rights Is Actionable Under The Law Of Tort

[4] There is no dispute that the plaintiff and the 1st defendant had a doctor-patient relationship. Indeed, the duty of care owned by a doctor arises out of his relationship with his patient. Without the doctor and patient relationship, there is no duty on the part of the doctor to diagnose, advise and treat his patient; see *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229. 1st defendant contended that invasion of privacy rights is not a recognized breach in tort under the English common law and hence it is also not an actionable tort in Malaysia pursuant to s. 3 of the Civil Law Act 1956. Learned counsel for the 1st defendant refers to *Clerk & Lindsell on Torts,* 18th edn, 2000 p. 19 para 1-34 which says that "privacy remains an interest unprotected by the English law of torts. However gross the invasion of the claimant's privacy, that violation of privacy is not itself a tort ... It would not be overlooked that violation of privacy can amount to violation of some other interest protected in tort. This may range from trespass to land to injury to health resulting repeated incursions of privacy or breach of confidence ..." Therefore learned counsel for the 1st defendant submitted that plaintiff must establish that there was a breach of confidence or trust by the 1st defendant resulting in the invasion of the plaintiff's privacy rights. To be able to succeed in such claim, three requirements must be satisfied ie, the information must have the necessary quality of confidence about it, the information must have been imparted in circumstances importing an obligation of confidence and there must be an unauthorized use or disclosure of that information. He cited in support *Clerk & Lindshall on Torts* at p. 1518 para 27 - 03 and *Murray v. Yorkshire Fund Managers Ltd* [1998] 1 WLR

951. It was also submitted that so long as the confider's identity is protected, the confidence is not breached referring to *Regina v. Department of Health Ex-parte Source informatics Ltd* [2001] QB 424 at 440 and *Medical Negligence* by Michael A Jones 2003 p. 173 at para 2-169. Since there is no evidence that the 1st defendant had disseminated the two paragraphs to any third parties or that he had made unauthorized use of the said photographs, learned counsel for the 1st defendant submitted that the 1st defendant was not in breach of any confidence or trust. It was further submitted that the 1st defendant being the treating doctor who had already seen the plaintiff's private part whilst undertaking the procedure cannot be said to have violated the plaintiff's privacy and that the moment the plaintiff had submitted herself to the 1st defendant to conduct the procedure, there is no longer any right of privacy available to the plaintiff.

[5] Learned counsel for the 2nd defendant similarly submitted that a claim on an infringement, invasion or violation of privacy is not a recognized tort or a course of action in Malaysia citing the case of *Ultra Dimension Sdn Bhd v. Kook Wei Kuan* [2004] 5 CLJ 285 and *Lew Cher Phow @ Lew Cha Paw & Ors lwn. Pua Yong Yong & Satu Lagi* [2009] 1 LNS 1256 Johor Bahru High Court Civil Suit No. MT 4-22-510-2007. It was contended that the photographs taken were taken in a clinical environment and intended for the plaintiff's medical record; there was no publication. Plaintiff's identity was also not known in these paragraphs.

[6] Plaintiff's counsel submitted on the other hand that the old school of thought does not recognize the invasion of privacy as an actionable tort. He relied however on our Court of Appeal's case of *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ 653 to contend that our Court of Appeal has recognized and affirmed invasion of privacy as a cause of action.

[7] In *Maslinda Ishak*'s case, His Lordship Suriyadi Halim Omar JCA, in delivering the judgment of the Court of Appeal has said at p. 657 as follows:

> [4] It was pleaded that at about 11.30pm on 21 March 2003 the appellant was arrested at the Kelab De Vegas at Jalan Imbi, Kuala Lumpur in a joint operation by officers of the 2nd and 3rd respondents. The appellant together with some other persons arrested, were then put into a truck and driven off

to Taman Maluri, Cheras. *Enroute* the appellant had requested from officers of the 2nd and 3rd respondents permission to use the toilet facilities but was disallowed. Instead she was scolded and told to urinate in the truck. As she was in quite a state, she asked her friends to shield her by encircling her with a shawl, in order to ease herself. At that particular moment, the 1st defendant suddenly opened the door of the truck, rushed in, pulled down the shawl and proceeded to take numerous photos of the appellant in a squatting position urinating. As a result, the appellant was thoroughly humiliated with the whole incident, which was within the view of everyone in the truck.

[5] There was abundance of evidence as regards this invasion of privacy, amongst others, his subsequent prosecution for a charge under s. 509 of the Penal Code under arrest case C83-494-2003. He pleaded guilty and was convicted of it. He was accordingly sentenced to four months jail *vide*, with the sentence confirmed by the High Court *vide* a revision. In fact, this issue of the invasion of privacy was never under challenge.

[6] To return to the pleadings, the appellant pleaded that her privacy had been invaded, resulting in her humiliation, trauma and serious mental anguish. She wanted general, aggravated and exemplary damages in the sum of RM5,000,000.00 interest and costs from the first defendant and the respondents. She pleaded that the officers of the 2nd and 3rd respondents at the material time, had negligently failed to protect her well-being, by allowing the first defendant to snap those photographs. To reiterate, at the end of the trial, the learned judge found for the appellant only as regards the first defendant, but not the rest of the respondents. Neither did the first defendant nor the respondents appeal against that decision.

[8] The learned trial judge found for *Maslinda Ishak* against the 1st defendant but not against the other respondents for whom she appealed. The Court of Appeal allowed her appeal and held the respondents to be jointly and severally liable for the wrongful act of their agent as well as vicariously liable. Although *Maslinda Ishak*'s case is not directly on point, the fact remains that the High Court in so finding has departed from the old English law that invasion of privacy is not an actionable tort and our Court of Appeal indirectly, though this issue was not canvassed, seems to

endorse such cause of action when the pleadings were specifically referred to and CA did not overrule invasion of privacy as a cause of action on ground that it is not one in line with the English law. Since such a cause of action has been accepted as a cause of action under our common law, it is thus permissible for a plaintiff to found his/her action on it. Drawing an analogy of this Court of Appeal case, I am inclined to hold the view that since our courts especially the Court of Appeal have accepted such an act to be a cause of action, it is thus actionable. The privacy right of a female in relation to her modesty, decency and dignity in the context of the high moral value existing in our society is her fundamental right in sustaining that high morality that is demanded of her and it ought to be entrenched. Hence, it is just right that our law should be sensitive to such rights. In the circumstances, plaintiff in the instant case ought to be allowed to maintain such claim.

[9] On the 1st defendant's submission of the cause of action for breach of confidence or trust which is the available cause of action in tort which plaintiff could proceed on provided that the three requirements for liability as stated in para 27-02 at p. 1518 in *Clerk & Lindsell on Torts* which has been cited above are satisfied, I shall consider these requirements in the light of the evidence in this case. On the first requirement that the information must have the necessary quality of confidence about it (per Lord Greene MR in *Saltman Engineering Co Ltd v. Campbell Engineering Co Ltd* [1948] 65 RPC 203 at 215), I find that the photographs taken showing the intimate part of the plaintiff's anatomy being her private part and/or anus ought to be reasonably inferred as information having the necessary quality of confidence as it involves the modesty, decency and dignity of a woman. The quality of confidence can be easily and reasonably inferred. Secondly, when the 1st defendant took the photographs in circumstances when the plaintiff was under anaesthesia, 1st defendant was under an obligation to maintain confidence of that information on the general duty of the doctor arising from the doctor-patient relationship that no information of a patient's medical information is to be disclosed without the express consent of the patient. The doctor is certainly obligated and duty bound to maintain strict confidence of those photographs or information which he had acquired in circumstances where he had not obtained the consent of the patient. I find this 2nd requirement

of obligation of confidence on the part of the doctor to have been satisfied. Thirdly, there must be an unauthorized use or disclosure of that information. There is no doubt that there is no direct evidence of the dissemination of the photographs taken of the plaintiff by the 1st defendant. However, evidence of the plaintiff showed that it was upon contacting the Hospital and speaking to the nurse that she was told that the photographs of her private part and/or anus were taken during the procedure when she was under anaesthesia. This information provided to the plaintiff at first glance would seem to be hearsay evidence without the nurse being called as a witness. However, when the plaintiff confronted the 1st defendant with what she was told by the nurse, the fact that 1st defendant had taken photographs of the anus of the plaintiff as narrated by the nurse was confirmed. Thus, what the plaintiff had been told by the nurse of the Hospital becomes a fact upon the admission by the 1st defendant and such evidence is therefore no longer hearsay. When the nurse of the Hospital was able to know of the confidential information ie, the photographs taken showing the private part and/or anus of the plaintiff, in the absence of any evidence of rebuttal or to the contrary, the reasonable inference is that there must have been disclosure or publication of that information. In the circumstances, I find that even if this court were to err to hold the view that invasion of privacy rights is actionable under our common law, plaintiff can still come within the cause of action of breach of trust or confidence for having satisfied the three requirements for liability under this cause of action in tort.

2nd Issue: Whether It Is An Acceptable Medical Practice For Photographs To Be Taken In The Course Of Surgical Procedure And Whether The 1st Defendant Is Entitled To Take The 2 Photographs Showing The Anus Of The Plaintiff Without Her Prior Knowledge And Consent

[10] The 1st defendant had produced the memory card of his digital camera which he used to take two photographs showing the anus of the plaintiff ie, one taken before the procedure and 1 after. The two photographs were shown to court and all counsel during this trial using the digital camera of the 1st defendant. All other contents in the said memory card were deleted by the 1st defendant leaving only these two images showing the anus of the plaintiff. Hence the admitted fact is that 1st defendant had taken

two photographs of the anus of the plaintiff. 1st defendant's contention is that it is an acceptable practice for doctors or surgeons to take photographs during procedure as it would be useful to explain the procedure and outcome to the patient. In other words photographs will facilitate surgeon's explanation of the procedure and its result with ease. 1st defendant contended that the taking of photographs during the course of the procedure without the consent of the patient is an acceptable practice relying on the evidence of Dr Akhtar Qureshi (DW3), a Consultant General and Colorectal Surgeon practising at Sunway Medical Centre, Petaling Jaya, and medical literature titled '*Clinicians taking pictures - a survey of current practice in emergency departments and proposed recommendations of best practice*' by P Bhangoo, IK Maconochie, N Batrick, E Henry (exh. D4) published in Emergency Medical Journal 2005; 22; 761 - 765). It is worthwhile to reproduce p. 763 of the said Emergency Medical Journal on the issue of 'consent' which states:

1. Consent

Image taken for clinical purposes form part of patient's health record. Consent to x rays and ultrasound investigations are given implicitly by the patient undergoing those procedures. Similarly, by presenting for treatment and investigation, the patient enters into a tacit agreement to documentation, which includes images as well as written information.

An image taken for the purpose of treating a patient must not be used for any other purpose without express consent. However, if such an image is subsequently to be published, or used for educational research, written consent must be sought for that specific purpose. Consent is not required when the image taken for treatment or assessment does not allow the patient to be recognized; in this case, the image can be used for educational or research purposes, with the caveat that "express consent must be sought for any form of publication". When making a judgment about whether the patient may be identifiable, one should bear in mind that apparently insignificant features may still be capable of identifying the patient to others. As it is difficult to be absolutely certain that

> a patient will not be identifiable, clinical photographs should not be published or used in any form to which the public may have access without the consent of the patient.
>
> If the patient is unable to give consent when the image is taken - for example, he or she is unconscious - then the image cannot be used until the patient has the capacity to give consent. Permission may be given by the immediate family if the patient is likely to be permanently incapacitated. Young people aged 16 years or over are assumed to be competent to give consent; under this age, Gillick competency (the level of competence of an individual in decision making referred to in *Gillick v. Norfolk & Wisbech Area Health Authority*) to give consent may have to be determined.
>
> It must be explained when obtaining consent that once the image is in the public domain, it is difficult to control its future use and it may not be possible to withdraw the image. Latest General Medical Council guidelines, published in April 2004, detail all aspects of patient confidentially and consent procedures.

[11] From the above extract, I presume 1st defendant is relying on the sentence that "consent is not required when the image taken for treatment or assessment does not allow the patient to be recognized." Nevertheless, there is expressed caveat that "express consent must be sought for any form of publication" and if the patient is unable to give consent when the image is taken - for example, he or she is unconscious - then the image cannot be used until the patient has the capacity to give consent." Consent is indeed significant and it is so reflected by the learned authors in the same article when they made the recommendations at p. 764, which the 1st defendant seems to ignore whether deliberately or otherwise, as follows:

> Consent procedures should be followed by those involved with obtaining clinical images, as this will protect the clinician and patient from misuse or misunderstanding about the intended use of the image.

A Although consent is not required for an annonymized image to be used for educational purposes it is common courtesy to explain how the image will be used, particularly as it may come into the public domain.

B Although the image that is solely to be used for treatment/clinical purposes does not require written consent, the existence of a written statement for consent stating the use of the material would help protect the patient and clinician in the event of litigation.

Ideally written consent should include:

C 1. An explanation of the need for and purpose of such documentation.

2. That the images will form part of their confidential health records.

D 3. These images may be used for research or educational purposes, or both.

4. The name and signature of the medical practitioner and consultant.

E If consent for clinical purposes only has been given then it must be clearly recorded as such.

[12] Quite vividly, from the recommendation of the learned authors, written consent is preferred in relation to obtaining of F clinical images. Even for an annonymized image to be used for educational purposes, the clinician will still have to explain to the patient how the image will be used. The recommendation above expresses that written consent is to be obtained ideally in particular that the written consent should include an explanation G of the need for and purpose of such documentation, or that the images will form part of their confidential health records which are relevant in the present case. The learned authors indeed indirectly endorsed the fact that the old practice is not proper and recommended the change to have written consent when images of H patient are to be taken by clinicians. There is certainly no question of tacit consent being recommended to avert written consent being obtained in advance from the patient before images are taken. Basically, the tacit consent referred to in the said article is in relation to images such as x-ray and/or ultrasound which are I kept by clinicians for documentation. Dr Mohamed Akhtar bin

Mohamed Ditali Qureshi (DW2), a Consultant General & Colorectal Surgeon, the expert witness called by the 1st defendant stated that for the procedure of stapler haemorrhoidectomy, the exposure of the patient of her anus must include the vagina. This is to allow access to the posterior wall of the vagina to ensure that the vagina vault is not included in the closed stapling device. He gave his view that photographs are frequently taken by surgeons and physicians during surgery and endoscopy and these photographs form part of the medical record. He added that it is an acceptable practice to take such photographs pre and post-surgery as they are useful to explain the procedure and outcome to the patient. Nevertheless, in cross-examination, DW2 agrees that whether photographs are to be taken or not the right is vested solely on the patient and patient must be informed in advance of the possibility of photographs having to be taken during the surgery. However, he disagrees that it is the duty of the surgeon to get the patient's consent before he takes the photographs as there was no guideline nor written law governing this photo taking. In re-examination he said that when patient is conscious when photo is to be taken, patient's consent is asked. When questioned by this court DW2 agrees that it is proper for consent to be obtained from female patient when images are to be taken of the intimate part of her anatomy.

[13] Having evaluated all evidence before this court, I find no doubt that in order for the surgeon to take photographs of a female patient's intimate parts of her anatomy as in this case, the proper procedure to adopt is to obtain her prior consent whether it is written or oral. This is in line with the recommendation as expressed in the article in the Medical Journal as cited by the 1st defendant who elects to ignore such recommendation. Even defence's expert witness DW2 agrees that it is only proper to obtain patient's consent in order to take photographs of the intimate part of the patient's anatomy, particularly, a female patient. Consent is thus not to be construed as an illusion or a formality but an absolute requirement when it involves images of the intimate parts of a female patient. I am of the view that medical practitioners ought to be sensitive to female patients in our country where their morality, religious value, decency, modesty and dignity are still considered high that any photograph of their intimate parts of their anatomy should have their prior consent

before images of them are taken before, during or after the surgery. In the present advance technology any information could have come to public domain if there is no proper security or safeguard to protect such information from misuse. The fear of the plaintiff in the instant case that her images showing her anus and/or private part taken without her knowledge as she was under anaesthesia and without her consent could have reached the public domain is not unfounded but tangible. Defence has contended that no consent is required for photo images to be taken during the procedure as it is the accepted practice. I am, however, of the view that a distinction must be drawn when taking photographs of the parts of the female's body which may expose her modesty and dignity as compared to photographs merely showing her hands or feet which if exposed would not cast any repercussion on her morality, decency, modesty, respect or others and might not have caused such degradation. Such accepted practice, if it is bad, ought to be changed to reflect the sensitivity of the female patients and to avert the vulnerability of misuse of such images showing the inner parts of a female's anatomy. DW3 who had been practising medicine in United Kingdom and Malaysia sees the distinction between the female patients in United Kingdom and in Malaysia as regards their sensitivity over images of their anatomy. He candidly admitted that prior consent is necessary from female patients in Malaysia before photographs of the intimate parts of their anatomy are to be taken. 1st defendant has been an experienced General & Colorectal Surgeon and ought to be well aware of the need to obtain plaintiff's prior consent for such photographs to be taken. If only he had followed the recommendation in the article as published in the Medical Journey which he relied on, he would have realized the so called accepted practice is obsolete and ought not to be used any longer. The article had made the recommendation of change; DW3 has endorsed that it is proper for prior consent from female patients before photographs of them are to be taken. This court does not see the rationale that the 1st defendant still persists that no consent is required. In any event, taking of photographs is not mandatory or compulsory during the procedure but it is discretionary ie, merely to facilitate easy explanation to the patient. Since patient's consent for the conduct of the procedure could be obtained before the procedure is performed, I do not find any valid reason why her consent

could not be obtained for the photography at the same time. Even if photographs are absolutely necessary in the circumstances of a particular situation and there is no opportunity to obtain the patient's consent as she is under anaesthesia, patient must still be informed at the first available opportunity for her consent. If consent is refused, then the images taken must be surrendered or destroyed as agreed by her. This was also not done by 1st defendant in the instant case.

[14] Learned counsel for the 1st defendant submitted that the moment the plaintiff had submitted herself to the 1st defendant to conduct the procedure, there is no longer any right of privacy available to the plaintiff. Such contention is certainly misconceived. The plaintiff had granted her consent for a specific purpose ie, for stapler haemorrhoidectomy and nothing else. 1st defendant could not do anything beyond that expressed consent. The proposition that there is no longer any right of privacy and 1st defendant could do as he pleased is a dangerous proposition which has no basis and ought to be rejected outright.

[15] From all the evidence before this court and on a balance of probabilities, I hold that the 1st defendant must obtain prior consent from the plaintiff or for that matter from any female patients before he can take photographs of her or their intimate parts of the female's anatomy. Modesty and decency of the female patients must be respected and not violated. A failure to do so constitutes an invasion of the plaintiff's privacy or a breach of the trust and confidence that the plaintiff as patient had reposed on the 1st defendant as her treating doctor. In the circumstances, I hold that the plaintiff has proved her case against the 1st defendant.

[16] Since the 2nd defendant has admitted that it is vicariously liable if the 1st defendant is held liable to the plaintiff, I will therefore hold that the 2nd defendant is vicariously liable to the plaintiff's claim.

3rd Issue: Aggravated And/Or Exemplary Damages

[17] Defence submitted that the plaintiff has not suffered any damage as a result of the said photographs being taken without her consent for reasons that the 1st defendant has not disseminated the photographs, that the 1st defendant was the

A only person who has access to the images and that the 1st defendant has already had sight of the plaintiff's private part. There was no unauthorized use of the said photographs. Plaintiff submitted that both the defendants have not expressed remorse or regret; the photographs were taken in the circumstances that the B plaintiff was unconscious; plaintiff's feeling of anger, resentment, sadness, disappointment, frustration, humiliation, loss of dignity, anxiety and anguish were not challenged by the defence was aggravated by the refusal of the 1st defendant to surrender the memory card which contained the images; otherwise had the 1st C defendant surrendered the memory card, this case would not have been brought to court. Learned counsel for the plaintiff suggested a sum of between RM100,000 to RM200,000.

[18] Aggravated damage is awarded as a form of a higher D compensation to show the disapproval of the acts of a defendant which were carried out in such a manner that the plaintiff has suffered more than would normally be expected in such a case; *Tort Law* by Catherine Elliot and Frances Quinn 7th edn, 2009. In *Rowlands v. Chief Constable of Merseyside* [2006] 1 WLR 1065, E the Court of Appeal awarded aggravated damages as compensation because Mrs Rowlands' compensatory damages included an amount for psychological injury. The fact of the present case which made the plaintiff feel anger, humiliation, frustration etc is because the 1st defendant had failed to obtain her prior consent F before taking images showing the intimate part of her body coupled with the 1st defendant's refusal to surrender the memory card which contained the said images to her when she requested for. It is not a case that 1st defendant had misused her images in any way as to cause her great pain, shame, humiliation and others G ie, any psychological injury. I am of the view that the mere feeling of anger, frustration etc by the plaintiff is the natural consequences of the 1st defendant's refusal to surrender the memory card containing her images to her. As it is stated in plaintiff's submission, if only the 1st defendant had surrendered the said H memory card to her, perhaps, this case would not have come to court. Plaintiff had stated in evidence that because of this incident, she has the fear of undergoing any invasive procedure under sedation as she has come to a point that she is unable to trust any doctors. I do not see the rationale of her perception for

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simple reason that with this experience, all the most she could easily inform any doctor expressly that she gives no consent for any images to be taken of her. With that express caveat, I do not think any doctor will persist to go against her wish. To qualify for aggravated damages, I am of the view that the acts must be calculated to injure the feelings of the plaintiff. I do not find sufficient evidence to justify aggravated damage to be awarded.

[19] Exemplary damages serve the purpose of offering a serious punishment to the defendant and to deter others from behaving in the same way. Without going into the categories of exemplary damages as propounded by Lord Devlin in *Rookes v. Barnard* [1964] AC 1129, the fundamental basis of exemplary damage must first be satisfied by the plaintiff ie, the plaintiff has to prove the culpability of the 1st defendant's conduct which must be so outrageous as to deserve punishment or deterrence. I find the fact that 1st defendant had taken plaintiff's images without her prior consent but had not misused them and the fact that 1st defendant refused to surrender the memory card of his digital camera to the plaintiff on ground that it contained other information coupled with 1st defendant's offer to delete them in the presence of the plaintiff but was rejected, 1st defendant's conduct cannot be construed as so outrageous as to warrant exemplary damages to punish and deter him. The three categories for the award of exemplary damages as laid down by Lord Devlin in *Rookes v. Barnard (supra)* are (i) where the conduct is calculated to make or to result in a profit; (ii) where there is oppressive conduct by government servants and (iii) where there is express authorization by statute. The instant case of the plaintiff does not fall within any of these three categories. Although our courts seem not to follow strictly the three categories of cases as referred to above (see for example, *Tan Kau Tiah v. Tetuan Teh Kim Tek, Salina & Co & Anor* [2010] 4 CLJ 914 CA; *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19), I find that the fact and evidence of the plaintiff's case do not merit exemplary damage to be awarded. Consequently, I hold that exemplary damage is not proved to justify an award.

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Conclusion

[20] For the foregoing reasons, I allow plaintiff's claim and award nominal damages against the defendant in the sum of RM25,000 with costs of RM10,000. As the memory card containing the two
B offending photographs has been produced to the court, I order that this memory card is to be destroyed by the deputy registrar of this court after the appeal period on a date fixed by the Deputy Registrar in the presence of the plaintiff and the defendants. With that, I do not find injunction to be necessary.

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